BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOE ENGSTROM	)	
Claimant	)	
VS.	)	
	)	Docket No. 265,291
GOLD STAR CONCRETE	)	
Respondent	)	
AND	)	
	)	
ALLIED MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 27, 2001 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument in Topeka, Kansas, on May 21, 2002.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Board the parties stipulated (1) claimant's date of accident should be treated as May 1, 1999, regardless of whether it occurred on that date or May 8, 1999; (2) claimant sustained a 7.5 percent whole body functional impairment due to his work-related accident; (3) the November 12, 2001 depositions of Larry Law and Janice Hastert are included in the evidentiary record; and (4) any references in the Award to Dr. Pope or Dr. Hood are actually to Dr. Douglas Rope.

ISSUES

This is a claim for a May 1, 1999 accident and resulting injuries to claimant's neck and upper back. The parties stipulated that claimant's accident arose out of and in the course of his employment with respondent. Likewise, the parties stipulated that claimant sustained a 7.5 percent whole body functional impairment due to that accident and that claimant's pre-injury average weekly wage was $542.52.

In the November 27, 2001 Award, Judge Avery determined claimant had sustained a 40 percent wage loss and a 50 percent task loss, which created a 45 percent work disability (a disability greater than the functional impairment rating). In determining claimant's wage loss, the Judge imputed a post-injury wage of $326 per week.

Respondent and its insurance carrier contend Judge Avery erred by failing to consider the November 12, 2001 depositions of Larry Law and Janice Hastert. They argue the restrictions that the Judge utilized in determining claimant's task loss were not credible and they also contend the Judge's finding that respondent failed to offer accommodated work was incorrect. Respondent and its insurance carrier argue claimant is not entitled to receive a work disability as respondent allegedly offered claimant accommodated employment within his medical restrictions that would pay a wage comparable to his pre-injury earnings. In the alternative, respondent and its insurance carrier request the Board to determine claimant's work disability utilizing the task loss opinions of Dr. Phillip L. Baker rather than the opinions of Dr. Douglas Rope. They further argue that claimant has a zero percent wage loss as he allegedly retains the ability to earn a comparable wage.

Accordingly, respondent and its insurance carrier request the Board either to deny claimant's request for a work disability or find that claimant has an 18 to 19 percent permanent partial general disability, representing a 37.5 percent task loss and a zero percent wage loss.

Claimant also contends the Judge erred. In his brief filed with the Board, claimant argues his permanent partial general disability is 60.6 percent due to an 81.25 percent task loss and a 40 percent wage loss. But at oral argument before the Board, claimant represented that the Award entered by the Judge was appropriate. In either event, claimant agrees the post-injury average weekly wage should be based upon an imputed wage of $326 per week, as determined by the Judge. In his brief to the Board, claimant argued he has sustained a 10 percent whole body functional impairment. But, as indicated above, the parties have now stipulated to a 7.5 percent whole body functional impairment.

Accordingly, claimant argues the Board should affirm the Award.

The nature and extent of claimant's disability are the only issues before the Board on this appeal, and more specifically the issues are:

1. Did claimant unreasonably refuse an offer from respondent of accommodated work within claimant's medical restrictions that would have paid claimant a post-injury wage comparable to his pre-injury average weekly wage?

2. What is claimant's wage loss for purposes of determining his permanent partial general disability as defined by K.S.A. 1998 Supp. 44-510e?

3. What is claimant's task loss under K.S.A. 1998 Supp. 44-510e?

4. What is claimant's permanent partial general disability?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In approximately 1989, claimant began working for respondent, a concrete construction company, as a general laborer and form setter. On May 1, 1999, claimant fell from a four foot high wall and injured his neck and upper back.

2. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent. Likewise, the parties stipulated claimant's average weekly wage on the date of accident was $542.52.

3. Immediately after the accident, claimant sought medical treatment from both his personal physician and personal chiropractor. Respondent and its insurance carrier then referred claimant for medical treatment with Dr. Michael Smith. Respondent and its insurance carrier paid claimant 31.5 weeks of temporary total disability benefits while claimant recovered from his accident. Towards the end of his medical treatment, respondent and its insurance carrier also referred claimant to Dr. Phillip L. Baker, who saw claimant in May 2000, for a functional impairment rating. Although the record is not entirely clear, it appears claimant initially treated with Dr. Smith through March 2000 but again returned to the doctor in March 2001, when the doctor recommended chiropractic treatment.

4. While treating claimant through March 2000, Dr. Smith restricted claimant to light duty work. Claimant contacted respondent about returning to work on two unspecified occasions. Both times, respondent indicated that claimant needed to be fully recovered before returning to work and, therefore, respondent did not have any work available for him to do. When respondent's insurance carrier terminated claimant's weekly temporary

disability compensation, claimant obtained work with another employer, Flint Hills Foods a/k/a Concept Foods, a chicken processor in Alma, Kansas. In that job, claimant worked on a line and alternately tucked chickens into boxes, placed those boxes into larger boxes, stacked the larger boxes on pallets, and moved the pallets by a hand truck into a cooler.

5. Claimant worked for the chicken processor for several months until he terminated his employment after being denied a promotion to an assembly line leader. Claimant explained that he left the processing company because he was denied the promotion due to the medical restrictions on his neck and upper back and, also, because his back was hurting. Claimant testified, in part:

> Q. (By Mr. Fincher) And why did you leave there?
>
> A. (By claimant) Because I didn't get a promotion and when I asked them why, it was because of my restrictions on my back. And it also -- the repetitious work was hurting my back and I felt that if I'm not going to go anywhere, I didn't want to stick with it, it just was hurting too bad.[1]

Claimant also testified that towards the end of his employment with Concept Foods, he had sought additional chiropractic treatment for his neck and upper back symptoms.

6. Although the record is not entirely clear, at least by early July 2000 claimant had begun working at Concept Foods.[2] A May 9, 2001 medical report prepared by Dr. Douglas Rope states that claimant terminated that job on April 22, 2001.

7. While continuing to apply for other jobs, claimant began delivering newspapers in the evening for the Topeka Capital-Journal earning $1,000 per month before expenses. Claimant worked the paper route for approximately two and one-half to three months. When claimant testified at the October 2001 regular hearing, he had begun selling vacuum sweepers for Premium Air Connections and had worked that job for approximately three weeks. In that job, claimant was being paid a commission but was guaranteed at least $150 per week.

8. Claimant's attorney hired Dick Santner to prepare a list of work tasks that claimant had performed in the 15-year period before the date of accident. Mr. Santner identified a total of 16 tasks. According to Mr. Santner, claimant's work history primarily consists of heavy, physical labor and he does not have many transferable work skills. According to Mr. Santner, claimant is probably limited to an entry-level position when he finds other

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[1] October 11, 2001 regular hearing, at page 12.

[2] See October 11, 2001 regular hearing transcript, pages 17 and 26.

employment. Mr. Santner testified that claimant retains the ability to earn approximately $8.15 per hour, which equates to $326 per week, which he was earning when he left Concept Foods.

9. Before this claim, respondent had never provided accommodated employment to an injured worker and only considered it in this instance after being approached by its insurance carrier. According to Larry Law, respondent's owner, respondent and its insurance carrier planned to provide claimant part-time work that was within his medical restrictions until, at least as far as respondent expected, he could ultimately resume his regular duties and regular working hours without restrictions. When he testified in November 2001, Mr. Law could not remember very many details of the plan to provide claimant with accommodated work such as when the insurance carrier approached him about returning claimant to work, how long claimant would be provided the accommodated work, when claimant would be expected to resume a 40-hour workweek, or what medical restrictions claimant would be working under during the accommodated work trial.

10. Vocational rehabilitation consultant Janice Hastert, whose company was hired by the insurance carrier, also testified concerning the plan to return claimant to employment with respondent. Ms. Hastert began working on a vocational assessment and placement plan in July 2000, at which time claimant had already begun working at Concept Foods' chicken processing plant. Ms. Hastert submitted the plan to claimant for approval in August 2000. The plan was designed to gradually return claimant to his regular work as a general laborer and form setter. The first step of the vocational rehabilitation plan required claimant to receive work conditioning before he would actually begin the gradual return-to-work program and initially begin working for respondent for approximately two hours per day.

11. Although there is nothing in writing to substantiate it, Ms. Hastert testified that the insurance carrier had agreed to pay claimant benefits during the vocational rehabilitation plan. The record is not entirely clear as to the type or amount of those benefits but, according to Ms. Hastert, they were to compensate claimant while he participated in the vocational rehabilitation plan and while he earned less than his pre-injury wages.

12. Claimant, however, declined to participate in the vocational rehabilitation plan as he was concerned he would be unable to resume his former job duties as a concrete construction laborer in which he was undisputedly required to lift up to 80 and 90 pounds and perform other heavy physical labor. Claimant was also concerned as his job at the chicken processing plant was easier than his construction job but he was still having problems with his neck and upper back. Finally, claimant also questioned Ms. Hastert as to what would happen in the event he could not do his former job and she could not provide any concrete answer, which likewise concerned him.

13. Dr. Smith did not testify but claimant recalls the doctor limited him to lifting 30 pounds maximum. Respondent and its insurance carrier did, however, introduce the testimony of board certified orthopedic surgeon Dr. Phillip L. Baker. Dr. Baker saw claimant in May 2000 for purposes of rendering a functional impairment rating. The doctor diagnosed claimant as having mid-thoracic pain secondary to a ligamentous strain and central disk bulging between the third and fourth cervical vertebrae, without evidence of nerve root compression. The doctor did not find any radiculopathy. Utilizing the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), the doctor determined claimant had a five percent whole body functional impairment. Because claimant had not worked for approximately a year when Dr. Baker saw him in May 2000, the doctor thought claimant needed a conditioning program, either informally at work or in a formal program in a work conditioning facility.

14. Dr. Baker also provided an opinion about what physical activities claimant should and should not do when he returned to work. According to the doctor, claimant could have intermittently lifted 25 to 40 pounds, but claimant also should have varied his work activities and initially only worked half-time. Additionally, the doctor would have had claimant monitored in a week to 10 days after returning to work to see how he was doing and to adjust his medical restrictions, if needed. When asked about claimant's job at Concept Foods, the doctor stated that there was no reason in the world why claimant should not be able to perform that job.

15. At his deposition, Dr. Baker reviewed the list of former work tasks prepared by Mr. Santner. The doctor indicated that as of the date of his evaluation of claimant, and before conditioning, claimant had lost the ability to perform the tasks numbered one through six and 16, or seven of the 16 tasks (for a 44 percent task loss). But with successful conditioning, the doctor believed claimant would be able to perform those tasks numbered one through four and 16, thus reducing claimant's task loss to two of the 16 tasks (for a 13 percent task loss).

16. On the other hand, claimant hired Dr. Douglas Rope to evaluate claimant and testify in this claim. Dr. Rope examined claimant in May 2001 and diagnosed left-sided cervical radiculopathy with residual pain and upper extremity weakness. Using the AMA *Guides*, the doctor rated claimant as having a 10 percent whole body functional impairment due to the May 1999 accident. Likewise, the doctor determined that claimant should avoid frequent overhead lifting and frequent bending, as well as other positions that would require cervical hyperextension. Further, the doctor adopted the results from a March 2000 functional capacity evaluation as reasonable limits for claimant to follow, which restricted ground-to-waist lifting to 30 pounds, restricted overhead lifting to 20 pounds, required frequent position changes, and restricted claimant from stooping and crawling.

17. Reviewing Mr. Santner's task list, Dr. Rope identified those tasks numbered one through six, eight, and 10 of the 16 former work tasks (or 50 percent), as tasks that claimant should no longer perform. The doctor also indicated that he had insufficient information to provide an opinion whether claimant had lost the ability to perform tasks numbered 15 and 16.

CONCLUSIONS OF LAW

1. For the reasons below, the Board concludes claimant sustained a 40 percent wage loss and a 50 percent task loss, which create a 45 percent permanent partial general disability. Accordingly, the Award should be affirmed.

2. Because claimant's injuries comprise a "non-scheduled" injury, the permanent partial general disability percentage is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the worker's post-injury ability to earn wages rather than actual post-

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

injury wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

3. The Board concludes claimant exercised good faith in seeking other employment following his release to return to work from Dr. Smith. Although the record is not entirely clear, it appears claimant obtained employment with Concept Foods shortly after being released by his physician to return to the workforce.[6] The Board also concludes that claimant had valid reasons for declining the vocational rehabilitation plan offered by respondent and its insurance carrier as claimant had already obtained other employment by the time the plan was formulated and there were also legitimate questions whether the plan would actually succeed as its success depended upon claimant's physical condition improving to his pre-injury condition, when he could lift 90 to 100 pounds and perform all of the heavy physical labor required of his former construction job. Any belief that claimant would achieve such unrestricted physical stature is based upon speculation.

> When considering an employee's rejection of an offer of accommodated work, the factfinder [sic] may weigh factors other than the physical demands of the offered work.[7]

4. Claimant does not challenge the $326 per week post-injury wage determined by the Judge. Comparing that wage to claimant's $542.52 average weekly wage on the date of accident, claimant has a 40 percent wage loss due to his May 1999 accident.

5. The Board affirms the Judge's finding that claimant sustained a 50 percent task loss due to his accident. The Board concludes Dr. Rope's opinion regarding task loss, in this instance, is more persuasive than Dr. Baker's.

6. Averaging the 40 percent wage loss with the 50 percent task loss yields a 45 percent permanent partial general disability, as determined by the Judge.

7. The Board adopts the findings and conclusions set forth by Judge Avery in the Award that are not inconsistent with the above.

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[5] *Copeland*, at 320.

[6] See October 11, 2001 regular hearing transcript, page 17.

[7] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, syl. 2, 9 P.3d 591 (2000).

AWARD

WHEREFORE, the Board affirms the November 27, 2001 Award entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director